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No. 81-1891

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MORRISON-KNUDSEN CONSTRUCTION COMPANY,

and

ARGONAUT INSURANCE COMPANY,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

and

SONIA HILYER, WIDOW OF JAMES H. HILYER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Pursuant to Rule 36 of the Supreme Court Rules, the National Association of Stevedores respectfully moves for

leave to file the attached brief as *amicus curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief. Counsel for respondent Hilyer has not.

STATEMENT OF INTEREST OF AMICUS CURIAE NATIONAL ASSOCIATION OF STEVEDORES

The National Association of Stevedores (NAS) is a nonprofit corporation incorporated on January 30, 1975 pursuant to the District of Columbia Non-profit Corporation Act, 29 D.C. Code 1001 *et seq.*, for the purpose of promoting, furthering and supporting the stevedoring and marine terminal industry in the United States, its territories and possessions. It is the corporate successor to the unincorporated association of the same name organized in the District of Columbia in 1933. It has been given tax exemption rulings by both the Government of the District of Columbia and the Internal Revenue Service. Sec. 1005 (b) of Title 29 of the District of Columbia Code specifically provides that a non-profit corporation shall have the power to sue and be sued, complain and defend, in its corporate name.

The present membership of the NAS comprises 64 private marine terminal and stevedore employers and their subsidiary companies doing business in ports on the nation's four seacoasts and the states of Hawaii, Alaska and the Commonwealth of Puerto Rico. Based upon U.S. government manhour statistics it is conservatively estimated that NAS member companies are responsible for over 75 percent of the industry's total manhours in all U.S. ports.

The member companies of the NAS employ the majority of U.S. longshore and privately employed marine terminal labor entitled to compensation pursuant to the Longshoremen's and Harbor Workers' Compensation Act, (the "LHWCA"), 33 U.S. § 901 *et. seq.* The NAS member companies are directly responsible for workers' compensation payments under both federal and state law either

as self-insured or through insurance carriers licensed by the U.S. Department of Labor or state insurance companies. Thus, the interest of the NAS and its member companies in the outcome of any litigation concerning the scope of benefits and jurisdiction of the federal LHWCA is second to none, except the injured workers.

LHWCA insurance costs, be it premiums paid to licensed carriers, or benefits paid directly to employees, are the second largest cost of a private marine terminal operator or stevedore company, exceeded only by direct payroll expenses. Any decision by this or any other Court or administrative body as to which employee is entitled to federal LHWCA benefits and the amount of such benefits, has a direct and substantial economic impact upon each and every member of the NAS. For these reasons, the NAS has been authorized and directed by its member companies to appear on their behalf in all appropriate Courts until such matters are finally resolved. Pursuant to that mandate the NAS has participated as a party before the Benefits Review Board, U.S. Department of Labor and before the Fourth Circuit Court of Appeals. In addition, the NAS appeared as *amicus curiae* before the Second and Fifth Circuit Court of Appeals and in this Court in *Northeast Marine Terminal Corp.* v. *Caputo et al.*, 432 U.S. 249 (1977), *Edmonds* v. *Compaignie Generale Transatlantique*, 443 U.S. 256 (1978), and *P. C. Pfeiffer Co., Inc.* v. *Ford*, 444 U.S. 69 (1979). In addition, this Court granted permission for the National Association of Stevedores to file a brief *amicus curiae* in support of the petition for *writ of certiorari* in this proceeding.

Amicus Curiae has examined the language and legislative history of the LHWCA and its 1972 amendments primarily in light of their impact upon stevedore employers who must pay compensation thereunder to injured longshoremen. *Amicus curiae* does not believe that the parties have considered the issue before this Court in pre-

cisely the same manner, especially as to the funding and operation of pension and welfare funds, and therefore requests that this Court grant it leave to file the attached brief.

Respectfully submitted,

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November 18, 1982

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BRIEF OF THE NATIONAL ASSOCIATION OF STEVEDORES AS AMICUS CURIAE

THE STATUTE INVOLVED

This case involves the proper construction of sections 2(13) and 9(e) of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC §§ 902(13) and 909(e), which provide as follows:

> SEC. 2. (13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.
>
> SEC. 9. (e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 906(b) of this title but the total weekly benefits shall not exceed the average weekly wages of the deceased.

THE QUESTION PRESENTED

The question presented to this Court, simply stated, is whether employer contributions made to union pension and/or welfare funds pursuant to collective bargaining agreements are "wages" within the meaning of section 2(13).

SUMMARY OF ARGUMENT

The Court below erroneously overturned over 50 years of administrative interpretations and administration of sec. 2(13) of the LHWCA, and in so doing exceeded its judicial powers. The Court ignored the legislative, administrative and practical understanding of the term

"wages" and, in effect, engaged in legislating an amendment to sec. 2(13), an amendment the Congress has not made since 1927. In addition, the Court erroneously concluded that the amount of employer contributions to union pension and welfare trusts are a "reasonable measure" of the value received by an employee as "wages." The fact is that such contributions are not equal to the value an employee may ultimately receive from a pension or welfare trust. Pension and welfare contributions are subject to ERISA and MMPAA of 1980, which federal laws clearly show that employer contributions are not wages; were never intended to be wages; and do not equate to "value received" by the employee. *Amicus curiae* submit that the decision of the Court below is in error both as to the law and the facts, and must be reversed.

THE FACTS

From November 1972 until he was fatally injured while performing construction work in the District of Columbia in April 1974, James H. Hilyer was employed by petitioner Morrison-Knudsen Construction Company. Under the collective bargaining agreement in effect during that time, for each hour that each employee worked, Morrison-Knudsen was required to pay 28 cents into a health and welfare fund, 35 cents into a pension fund, and 5 cents into a training fund. These funds provide employee benefits such as life insurance, health insurance, retirement benefits, and career training. The contributions were made directly to the trust funds, not the employees, and the individual employees had no role in the fund's management.

After Hilyer's death the company began paying death benefits to his widow, respondent Sonia Hilyer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act ("the LHWCA"), 33 U.S.C. § 901 *et*

seq., which is made applicable to employment in the District of Columbia by D.C. Code Ann. § 36-501 (1973). Under 33 U.S.C. § 909, the weekly death benefit due respondent Hilyer was 66⅔ percent of her husband's average weekly wage as determined under 33 U.S.C. § 910.

Respondent Hilyer disputed the amount of the benefits being paid her, contending, *inter alia*, that calculation of her husband's "average weekly wage" erroneously failed to include his employer's contributions to the three union trust funds. An administrative law judge rejected her contention, and the Benefits Review Board affirmed that portion of his order.

On appeal to the United States Court of Appeals for the District of Columbia Circuit pursuant to sec. 21 of the LHWCA, 33 U.S.C. § 921, that Court reversed the Benefits Review Board, stating:

> In conclusion, it is clear that if the value received by the employee is reasonably identifiable and calculable then it must be included in the average weekly wage of the employee. We hold that the fringe benefits at issue here amount to value received by the employees, and that it is reasonable to measure such value by the amount of the employer's contribution to the various fringe benefit funds. *Hilyer* et al. v. *Morrison-Knudsen Construction Company et al.* 670 F.2d 208, (D.C. Cir.-1981).

For the following reasons, *amicus curiae* submits that the decision of the Court of Appeals is wrong and should be reversed.

ARGUMENT

A. Purpose of the Act

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, 44 Stat. 1424 (the "LHWCA") was enacted in 1927 to provide workmen's compensation for longshoremen and harborworkers injured on navigable waters, *Northeast Marine Terminal Co., Inc. et al.* v. *Caputo et al.*, 432 U.S. 249 (1977). That original act contained the same definition of "wages" as that now set forth in sec. 2(13) of the LHWCA, 33 U.S.C. § 902(13), the meaning of which is the issue before the Court in this proceeding. Although the LHWCA has been amended several times since 1927, the definition of "wages" in sec. 2(13) has never been changed by Congress.

The primary purpose of the Congress in enacting the LHWCA was to provide a federal workers compensation law for longshoremen injured over navigable waters because this Court in a series of decisions between 1917 and 1924 culminating in *Washington* v. *W. C. Dawson & Co.*, 264 U.S. 219 (1924) held that such coverage could not be provided by state laws and that the attempts of Congress to authorize such coverage under state laws were unlawful delegations of congressional authority. Compensation to injured workers and their survivors was set at a percentage of the worker's "wages" subject to specific *maxima* and *minima*, 33 U.S.C. §§ 906, 909, and 910. In 1927, longshoremen's wages were paid daily for hours actually worked that day, or on a weekly basis if the longshoremen were able to work steadily for a week. Sec. 10 of the LHWCA provided then, and still does today, for alternative methods of calculating the average weekly wage of the individual longshoreman seeking compensation benefits.

In 1927 the calculation of "wages" was rather uncomplicated, because at the time hourly wages, then 80 cents,

were the only remuneration paid to longshoremen at Atlantic ports, Gulf ports and Great Lakes ports. Although the legislative history of the 1927 enactment is silent on the definition of "wages" in sec. 2(13), a clear reading of the definition is that the term "wages" means only money, or the monetary value of board (food), rent, housing, lodging or similar advantage *received* by the employee from his employer or a gratuity received from others in the course of his employment. In 1927 as to longshoremen, the main beneficiaries of the LHWCA, that meant the hourly wage of 80 cents.

B. History of "Wage" Agreements in the Stevedore Industry

The first departure from the hourly wage in any contract for longshoremen on the Atlantic Coast was in 1945, some 18 years after enactment of the LHWCA. In 1945 employers agreed to pay 3.5 cents per hour as "vacation pay" against an hourly wage rate of $1.50. In 1948 a welfare and disability *contribution* was added at the rate of 2.5 cents per hour. Finally, in 1950, some 23 years after enactment of the LHWCA, pension *contributions* entered into labor management contracts. In 1950 the straight time hourly wage was $1.48; the welfare *contribution* 4 cents; and the pension *contribution* 5 cents.

Hourly wages and vacation and/or holiday pay are different than pension and welfare *contributions* paid by the employers. The only common element is that the employer's payments are measured by man hours worked, but in some instances employer contributions set forth in current collective bargaining agreements are based on the tonnage (amount of cargo handled) rather than manhours. Hourly wages, vacation and holiday pay set forth in the various collective bargaining agreements are readily identified; are taxable income to the employee; are stated on the employer's W-2 form filed by the employer with the Internal Revenue Service; and *are* considered as "wages" within the meaning of sec. 2(13).

Unfortunately, and *amicus curiae* submits, erroneously the Court of Appeals for the District of Columbia circuit in *Hilyer*, 670 F.2d at 211-13, and lately the Court of Appeals for the Ninth Circuit in *Duncanson-Harrelson Company et al.* v. *Director, Office of Workers' Compensation Programs, United States Department of Labor*, —— F.2d ——. Nos. (A 79-7093, and 79-7094 decided September 14, 1982) determined that the term "wages" in sec. 2(13) "includes the values received from the employer that are easily identifiable and calculable", and that employer contributions to unions health and pension funds are to be included as "wages" received by the employee.

C. Employer Contributions to Union Trust Funds Are Not "Wages"

Stevedore employer contributions, funding, or assessments into unions trust funds are not wages. They are not taxed by the Internal Revenue Service, and are not reported on any W-2 Form. Other than certain payments, such as holiday and vacation pay, some royalty payments (all of which are reported to the Internal Revenue Service on W-2 Forms), the amount of employer payments into the various union trust funds bears little relationship to the amount paid out by those trust funds to individual employees. The funding of such trust funds and disbursements therefrom are governed by and subject to (1) the individual trust fund documents, (2) actions taken by the fund trustees and (3) actuarial assumptions, all of which are subject to the provisions of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. 1001 *et. seq.*, 88 Stat. 829, and more recently the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1001a *et. seq.*, 94 Stat. 1208.

Although many collective bargaining agreements in the stevedoring industry provide for employer payments or contributions to several trust funds jointly administered

by management and union selected trustees, whose obligations and duties are set forth in the trust agreement *not* the collective bargaining agreement, further discussion herein will be limited to pension and welfare funds, all of which are subject to ERISA and MPPAA. Each pension and welfare trust agreement sets forth the eligibility and vesting requirements of benefits of the individual employee, *not* the collective bargaining agreement. Some plans provide for the employee receiving credit towards his vesting and eligibility requirements in the event of injury for the duration of the injury or a shorter period. Some plans provide for life insurance in the event of death. Some plans continue medical and welfare benefits to survivors of deceased workers. Some plans provide for dental care or eye glass replacement. Some plans include benefits paid for past service to employees who have already retired from the work force. Those past service benefits are paid in part from employer contributions based on active worker man hours.

The *value* of the employer's funding of benefits cannot be ascertained from the employer's contributions to the plan, especially a multiemployer plan, nor from the collective bargaining agreement. An individual employee's share or value of each plan must be ascertained on an individual basis, and that can only be done by plan or fund trustees, actuaries and counsel.

D. Employer Contributions to Union Trust Funds Are Not a Reasonable Measure of Value Received by an Employee

If employer contributions to pension and/or welfare trusts were sure and accurate measures of the value received by the employee from the employer there would have been no need for Congress to enact ERISA in 1974. As Congress found, many employees do not receive agreed upon pension and/or welfare benefits because of (1) fund vesting requirements, (2) underfunding of trusts so that

the funds are unable to pay agreed upon benefits, or (3) plan terminations, 29 U.S.C. § 1001. So ERISA was enacted in an attempt to protect employee retirement and other benefits, but nowhere in ERISA did Congress indicate that it intended that the contributions paid be treated as "wages."

Congress amended ERISA in 1980 by enacting the MPPAA of 1980 with respect to the termination of multiemployer pension plans and to add further protection to workers in the event of employer withdrawals from plans or from plan terminations, 29 U.S.C. § 1001a. Again, as in 1974, Congress did not indicate that "wages" and pension plan contributions were the same, or were to be treated as the same in any respect. Congress well realized that there is a significant difference between the two. Congress' only concern was to insure that employer contributions were adequate to pay promised benefits to *eligible* employees. The mechanisms for funding the various plans were for the employers to decide, and the benefits to be paid were for the plan trustees to decide, subject to minimum vesting standards, 29 U.S.C. § 1053, and minimum funding standards, 29 U.S.C. § 1082.

The complexity of secs. 1053 and 1082 clearly demonstrate that the amount the employer contributes to any union trust fund in any one year predicated on an employee's manhours worked has no readily ascertainable relationship to the value which that employee may ultimately receive. For example, if an employee were to die or leave the employment prior to the vesting of benefits that employee would by law receive no value from the contribution.

Amicus curiae submits that Congress clearly demonstrated by its legislative actions in the LHWCA, ERISA and the MPPA that employer contributions to union pension and welfare trusts are not "wages" and were never

intended to be treated as such. Such contributions are merely a means to fund the variety of obligations established in the trust fund agreement.

E. Administrative and Judicial Interpretations of "Wages"

Until the decision of the Court of Appeals for the District of Columbia in *Hilyer* the Department of Labor which administers the LHWCA consistently excluded employer contributions to union premium and welfare funds in the calculation of an injured worker's "wages". Until the *Hilyer* decision no court since 1927 determined that such employer contributions were "wages" of the employee. Only once, in *Hilyer*, did a representative of the Department of Labor depart from the long held departmental position, but shortly thereafter the Director, Office of Worker's Compensation Program admitted the error made in *Hilyer*, and returned to the long held departmental position, *Duncanson-Harrilson Company et. al.* v. *Director, Office of Workers' Compensation Programs, supra.*

Over 50 years of consistent administrative and judicial interpretations of the term "wages" was, we believe, erroneously overturned by the court in *Hilyer* because it did not understand the true nature of employer contributions to pension and welfare trusts, and that benefits funded by such contributions do not directly correlate to the benefits the individual employee will ultimately receive. The decision of the court below is not a judicial interpretation of legislation, but is an attempt to amend legislation. That is a function of the Congress not of the courts, *Director, Office of Workers' Compensation Program et. al.* v. *Rasmusson et. al.*, 440 U.S. 29 (1978),[1] and therefore, must be reversed.

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[1] "Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a line.' Our task is to interpret what Congress has said; . . .". *id.* at 47.

F. The Disastrous Effects of Hilyer

If the decision in *Hilyer* is not reversed, and if employer contributions to various pension and welfare trusts are to be included in the computation of "wages" under the LHWCA, employers subject to the Act could well be forced into bankruptcy and the administrative process collapse under the weight of endless litigation involved in new cases and cases reopened pursuant to sec. 22, 33 U.S.C. § 922.

For example, stevedore employers on the Pacific Coast, parties to the collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union (ILWU) would be obliged to add to the $13.52 hourly wage for longshoremen an additional $4.46 in pension and welfare fund contributions. That is an increase of 33 percent in the compensable hourly "wage." Under the terms of the several collective bargaining agreements between various shipping associations and the International Longshoremen's Association (ILA) in effect on the Great Lakes, Atlantic, and Gulf Coasts employer contributions to pension and welfare funds range from $2.91 to $6.80 against an hourly wage of $12.80 for longshoremen. Those are increases ranging from 22 percent to 53 percent in compensable hourly "wages."

If the employer contributions are included as "wages" an injured longshoreman on the Pacific Coast could receive in tax-free LHWCA benefits $478.98 per week (⅔ x $13.52 + 4.46 x 40 hrs.), which amount will exceed his "wages" when working ($540.80 per 40 hour week) less state and federal income taxes. At the same time the injured employee continues to earn credits towards retirement and other welfare benefits. The incentive to return to work when able, a major cornerstone of any workers' compensation program, is thus destroyed. There is no longer any incentive to return to work for taxable wages. The same result will appear on the Great

Lakes, Atlantic and Gulf Coasts where employer contributions to pension and welfare trust averaged over $4.00 in 1981 against a base wage rate of $12.80.

In addition to the expected increase in litigation over what is or is not "wages" for each employee in every compensation case filed under the LHWCA, litigation will surely arise over which pending or closed LHWCA cases are subject to applications for modification pursuant to sec. 22, 33 U.S.C. § 922. For the foreseeable future both the Department of Labor and employer/carriers subject to the LHWCA will be inundated with sec. 22 modification applications as well as newly created litigation over what items are "wages" and what items are not, as no collective bargaining agreement or trust fund agreements are precisely the same.

Litigation can be easily forecast over the issue of pension or welfare fund payments which are actually paid to injured workers or their survivors being offset or deducted from LHWCA compensation payments. For example, should a survivor enjoy life insurance payments from the trust fund plus the value of the cost of obtaining such insurance? Another clear ground for new litigation is the question of whether an injured employee, who under the trust agreement continues to receive credit for vesting and pension payments upon retirement, should at the same time receive the value of employer contributions designed to fund such benefits. In short, under a *Hilyer-type* ruling may the employee or his survivor receive both the trust fund benefit and the cost of purchasing the benefit? If this Court affirms the rule in *Hilyer* then ultimately this Court and the several courts of appeals will soon be faced with endless litigation over the issue of double recovery, retroactivity, and the true value of pension and welfare funding.

One final issue which will require resolution is the question of employer contributions to "defined benefit plans" in which the collective bargaining agreement does

not set forth the amount of employer contributions, such as the Pacific Maritime Association-ILWU agreement. Under such agreements the benefits are agreed upon and the employers later, without employee participation, decide amongst themselves the appropriate means and funding levels necessary to meet the collectively bargained trust fund agreements. That issue is not now before this Court, nor was it before the Court below in *Hilyer*, but it soon will be.

The potential for endless and complex litigation that will arise if over 50 years of settled and consistent interpretation and administration of sec. 2(13) is allowed to be overturned as the Court below has done in *Hilyer* is tremendous, and the added cost to employer/carriers, the system, the Courts, and the Department of Labor is inestimable. Indeed, the system and the industries subject to the LHWCA may collapse under the combined weight.

CONCLUSION

For all the reasons set forth above, *amicus curiae* National Association of Stevedores, urges this Court to reverse the decision of the Court below.

Respectfully submitted,

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